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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

APR 11 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Additional Comment Sought on)
Rules Governing Telephone)
Companies' Use of Customer)
Proprietary Network Information)

CC Docket No. 90-623
CC Docket No. 92-256

COMMENTS OF U S WEST COMMUNICATIONS, INC.

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COMMENTS OF U S WEST COMMUNICATIONS, INC.

I. INTRODUCTION AND SUMMARY

U S WEST Communications, Inc. ("U S WEST"), herein responds to the Federal Communications Commission's ("Commission") recent Public Notice regarding "customers' [Customer Proprietary Network Information] CPNI-related privacy expectations, and whether any changes in [the Commission's current] Rules are required to achieve the best balance between customer's privacy interests, competitive equity and efficiency."¹ The Commission is apparently concerned that the balance it has consistently struck with regard to CPNI needs to be reexamined because "[i]n recent months . . . local telephone companies have planned and entered into a number of alliances, acquisitions and mergers with non-telephone company partners."² The Commission wonders if "[i]n this changing environment, access to CPNI among affiliated companies may raise additional privacy concerns."³

¹Public Notice, Additional Comment Sought on Rules Governing Telephone Companies' Use of Customer Proprietary Network Information, CC Docket No. 90-623, CC Docket No. 92-256, FCC 94-63, rel. Mar. 10, 1994 ("CPNI Public Notice"), at 1.

²Id. at 2-3.

³Id. at 3.

While U S WEST appreciates the Commission's concerns, we do not believe its concerns over consumer privacy can be substantiated such that the Commission's existing CPNI Rules, "refined over a period of several years,"⁴ should be materially changed.⁵ For the most part, the Commission's existing CPNI Rules already strike the appropriate balance with respect to consumer privacy. Those Rules, as the Commission acknowledges, are predicated on the finding that "customers' expectations of privacy [can] be met without a notification obligation or a prior authorization requirement for internal [former Bell Operating Company] BOC use of residential and small business customers' CPNI."⁶ Indeed, the record evidence before the Commission in the Computer III Remand Proceeding,⁷ fully substantiates this finding.⁸

⁴Id. at 2.

⁵This is the eighth time that the Commission has inquired into and analyzed information about individuals' expectations (often including their "privacy" expectations) with regard to CPNI. U S WEST has previously addressed this matter at substantial length. See In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguard; and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, U S WEST Comments, filed Mar. 8, 1991, at 63-99. (A copy of these relevant pages is attached to this filing as Appendix A. References to these Comments are cited as "U S WEST Computer III Remand Comments, Appendix A at xx - xx.") Much of what we say in this instant filing is repetitious of what we have said before. Customers' privacy expectations may not be as fragile as the Commission might imagine and those expectations can be expected to change over time just as markets and distribution avenues change. See discussion in Section II., B.

⁶CPNI Public Notice at 2.

⁷In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd. 7571 (1991).

⁸See supra note 5.

If there is a part of the Commission's existing CPNI Rules that is out of synchrony with respect to existing customer "privacy" expectations, it is those aspects of the Rules which require affirmative customer authorization before a BOC can use customer information for internal business purposes (i.e., with respect to customers with more than 20 lines) and the mechanically restricted access provisions contained in those Rules. If the Commission is inclined to modify its Rules in any respects, it should eliminate any "prior authorization" requirements and impose use, not access, restrictions on BOCs with respect to their use of CPNI.

With its CPNI Rules, the Commission has sought to balance certain competing interests, specifically competitive "parity" with respect to CPNI access and customer privacy. As a general matter, however, those access/privacy interests have always been opposing: customer privacy interests have always pointed in the direction of "unequal" access to customer information. In that respect, the Commission's existing rules currently weigh consumer "privacy" interests more heavily in the balance than competitive ones. But that is how it should be because in all cases a customer can request that information about that customer be released to a third party. This provides all customers with choice and control and does no violence to the relationship of trust that those customers currently enjoy with the BOCs.

At U S WEST we treat our customers' privacy and confidentiality concerns seriously. We seek to maintain the trust we know our customers have reposed in us in the everyday operations of our -- and their -- businesses. We operate all of

our businesses with integrity with regard to our information uses and distributions. While in all circumstances those uses and distributions have not been formally "announced," we believe that our relationships with our customers, in each of our businesses, drive us to be responsive to their concerns about how information regarding them is gathered, used and distributed.

In order to better serve our customers in an ever-changing telecommunications environment, U S WEST has been an active participant in the investigations and dialogue around the matters of consumer privacy, especially with respect to transactional information, for many years now.⁹ In light of all our work with regard to the matter of "privacy" and "information policy," we approach the matters under consideration in the CPNI Public Notice from a vantage point of seriousness and expertise. We are not "Johnnies come lately" to the issues, but have a keen understanding that any serious policy in the areas of information policy and privacy must stem from a position of knowledge -- knowledge of markets (especially the burgeoning information market), human behavior, social science and legal imperatives and enforceability.

From an educated position in the area of consumer privacy and information policy, U S WEST makes the following points below:

1. No entity has ever demonstrated that customers do not expect businesses that they do business with to access and use information about them in the course of doing business, including product

⁹See Appendix B for a description of U S WEST's various and varied activities in this regard, both internal and external.

development and marketing. To the extent that a different information access and use model is suggested for companies providing telecommunications services than for other businesses, the suggestion is driven by motivations other than consumer privacy.

2. Recent research demonstrates that customers find acceptable the practice of information sharing among affiliated businesses. Such sharing often results in additional information being conveyed to consumers about other products/services they might be interested in, as well as the conference of benefits to consumers, which advantage not just the consumer but the overall economy.
3. CPNI "equal access" demands are driven by competitive, not consumer, considerations. Claims of "equal access" to consumer transactional data as between businesses that have an existing business relationship with a consumer and those who do not require either that a consumer's privacy expectations be severely compromised or that the consumer be deprived of valuable product/service information and opportunities from the business (including its affiliated companies) with the existing business relationship.

Below, we describe the basis and support for the propositions stated above.

II. THE STARTING PLACE: CUSTOMER EXPECTATIONS OF PRIVACY VIS-A-VIS COMMERCIAL ENTITIES

At U S WEST, we know our customers. Much of what we know about them attitudinally is known through the vehicle of the relationship itself: not just what they say, but what they do not say. While we do not have "statistically verifiable" proof for every proposition we espouse in the area of information policy as it relates to consumer privacy, much of what we say is a result of common sense, validated by periodic "tests" of the soundness of our understandings.

We know that our customers do not have a "privacy" problem with our using information about them to know them better, to anticipate their product/service needs, to take those needs into account in our product design and development work and to sell customers products and services they are interested in. In fact, our customers expect us to know them, so that we can better serve their various, though individual, needs. This is true regardless of whether those needs would -- under some rigid legal formula -- be needs satisfied by products in "different markets."¹⁰ We know that customers do not want us to provide information about them to third parties, except under circumstances they understand and agree with, either expressly or implicitly. We know that this does not create "equal access" to information about our customers that we have. We know that equal access principles with respect to our customer information can operate either to compromise our customers' legitimate privacy expectations or to deprive them of a source of information about or a distribution avenue for products and services they might desire.

What we know about our customers' "privacy" expectations cannot reasonably be challenged by the unsupported allegations or

¹⁰The market response to our voice messaging service ("VMS") (an enhanced service) demonstrates that customers' "privacy" expectations regarding the use of information about them being used for other than the provision of monopoly service does not correspond to rigid antitrust market definitions and approaches. As of December, 1993, U S WEST had 678,744 VMS customers in operation. A large majority of these customers are used by residential and small business subscribers. Clearly, the "purpose" for which information is gotten from customers and used by the telephone company is not seen by customers as being circumscribed to "basic" (or monopoly) services, despite what competitors or privacy advocates would have regulatory and legislative policy makers believe. See also infra notes 14, 23, 53 and accompanying text.

logical fallacies of others. Until some party can produce factual evidence that our customers want our competitors (i.e., third parties who often have no independent relationship to our customers) to have information about them or until privacy advocates can affirmatively demonstrate that our customers want to be polled about our internal information use, despite our existing business relationship with those customers, the arguments of such advocates should be dismissed. They are either motivated by attempts to advance a competitive position, despite the cost to consumer "privacy" expectations or quality service, or are intellectual debates devoid of market substantiation or validation. U S WEST, like other large, multi-faceted organizations, should be permitted the freedom to use our own business information in ways that we deem most appropriate -- ways responsive to market initiatives and demands.¹¹

The above observations are not merely "position posturing." Rather, they are educated by our first-hand experiences with our customers, by attitudinal and opinion surveys, and by common sense. The same cannot be said for many of the remarks made by self-anointed consumer "advocates" and competitive providers who purport to advise public policy makers about what "consumers" want or expect in the way of "privacy" with regard to information about them.

¹¹Compare discussion of the Cable Communications Policy Act of 1984 ("1984 Cable Act") and the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") (collectively, the "Cable Acts") and the 1988 Video Privacy Protection Act ("Video Act") below at Section III., C.

A. Consumers Having an Existing Business Relationship with a Business

Consumers expect businesses with whom they have existing business relationships to have information about them, including transactional information.¹² Certainly, knowing that a company has such information, customers must expect (or at least not be surprised by the fact) that companies, and their employees, use the information that they have to run their businesses -- to handle requests for service or repair questions, to bill, to learn more about customer likes/dislikes or purchasing trends, for product design and development and to market new products and services. And customers must expect that when they contact a company with whom they have an existing business relationship, that company will know something about them, i.e., will have access to information about them in order to respond to them in a knowledgeable and educated way. Obviously, no customer expects to be treated like a stranger or repeat basic identifying customer information on each and every call or transaction with a business with which they have an existing relationship.

¹²"Generally, people and organizations have a right to make records of transactions to which they are a party, and they have control over those records. In a sense, when two parties enter into a contract, each party owns the records he or she keeps in the ordinary course of business. They could agree, within limits, to keep the transaction confidential." McManus, Thomas E., in Telephone Transaction-Generated Information: Rights and Restrictions, May 1990, Program on Information Resources Policy, Harvard University, Center for Information Policy Research ("McManus Report"), at 50, and compare id. at 13. U S WEST previously provided the Commission with copies of the McManus Report. See U S WEST Computer III Remand Comments, Appendix A at 64-65 & n.220.

While the above-stated propositions seem self-evident,¹³ regulators and legislators continue to seek "proof" of the propositions themselves. U S WEST has limited proof of the proposition, which we offer below.

But even more important, perhaps, than our limited proof is the fact that to the best of our knowledge no one can (or has ever really tried to) "prove" (rather than "assert") to the contrary. That is, no one has ever demonstrated that a company's use of its own internal business information to provide quality service and offer varied products/services to customers violates customers' privacy expectations.¹⁴ Based on our information, we

¹³"To a great extent, the degree to which these rights [privacy/access] can affect the records varies with the relationship of the parties[.]" McManus Report, Appendix 2 at 50. See also id., Appendix 3 at 87 ("We share different levels of personal information and have varying expectations of confidentiality with people and organizations depending on our relationship with them. . . . For these and other reasons, a general guideline for precedent regarding [customer information] access, ownership, and privacy is to focus on relationships.").

¹⁴The arguments that are usually made take one of two forms, neither of which are privacy motivated or sustainable from a privacy perspective: First, that telephone companies have their consumer data as a result of their monopoly position and should not be able to profit from it in other markets. Second, that consumers provided the telephone company with information for the "purpose" of getting basic telephone service and no other.

The first argument is not a privacy argument at all. It is an argument made either to deprive the monopoly of the benefit of the information in an adjacent competitive market or to secure to the ratepayer some of the value associated with the information itself, à la a Democratic Central Committee-type of claim. See Democratic Cent. Com. of D.C. v. Washington M.A.T. Com'n, 485 F.2d 786 (D.C. Cir. 1973), cert. denied, 415 U.S. 935 (1974). "In competitive businesses, information collected about customers is not generally considered to be owned by the customers. It is primarily in a monopoly situation, where the expense of data collection is arguably borne by telephone ratepayers, that ownership comes into question." McManus Report at 18.

(continued...)

believe no such demonstration could be made.

In 1989, in conjunction with the then-called U S WEST Privacy Task Force,¹⁵ U S WEST conducted a qualitative study of customers with regard to privacy concerns ("1989 Focus Groups").¹⁶ The groups included both residential and business customers, and both customers with published numbers and those with nonpublished numbers. The focus groups also included opinion leaders in their makeup.

On the whole, the respondents were well aware of the importance of personal information to businesses and were quite comfortable with uses of information which they routinely agreed to -- either directly or by implied consent. The respondents felt that they should be kept informed about the uses of

¹⁴(...continued)

The second claim is repudiated by market evidence. As mentioned above (see supra note 10), U S WEST's experience with our VMS service demonstrates that consumers do not have a "use for a single purpose" expectation with respect to a telephone company's use of information about them. While it is clear that consumers must give telephone companies information in order to get basic telephone service, no one has ever demonstrated that those same consumers expect no other communication or extension of benefits beyond those pertaining to basic telephony. Indeed, all evidence suggests to the contrary. See page 14 and Section II., B., below.

¹⁵See Appendix B for a further discussion of the formulation and work of this Task Force.

¹⁶It is obvious that qualitative focus group research/proof is not based on a statistically verifiable model and is not appropriately used as a predictive device. However, such information is a useful "snapshot" of existing customer expectations and how those correspond to existing business practices. That is, to test how the status quo meets with or compromises customer expectations. Such information, while limited, should not be dismissed as being without value. This is especially true as it seems almost bizarre to expect a company to expend substantial sums of money to conduct a statistically valid survey with regard to a matter that could be argued to be self-evident or intuitively obvious.

personally-identifiable information and accorded certain choices and control mechanisms with regard to such information. The respondents felt that the telephone company should act in the role of guardian of information concerning them and that no third party was entitled to use personal information about them unless they were aware of the circumstances surrounding such use and had no objection. Significantly, while business respondents recognized the value of telephone company customer data, they expected access only to an individual's name, address and telephone number.¹⁷

In 1993, U S WEST conducted another focus group exercise, this time with residential customers having nonpublished and nonlisted telephone numbers, i.e., those customers thought to be at the apex of the privacy concern curve. In this residential focus group ("1993 Focus Group") customers indicated that they had no problem with the phone company marketing services to them, via either telemarketing or direct marketing, although they generally preferred direct marketing contacts over telemarketing ones.

Additionally, U S WEST has information from our small and large business customers which indicates that those customers expect to hear from, and appreciate hearing from, their service providers, including U S WEST, about new products and services.

Obviously, customers in an existing business relationship with a supplier have little privacy concern over that company's access to transactional information about them. This is

¹⁷Compare infra note 75.

obviously what led the American Telephone and Telegraph Company ("AT&T") to argue, during its customer premises equipment ("CPE") structural separation proceeding,¹⁸ that it should be permitted to use "all the information and resources at its disposal to better serve its customers' telecommunications needs[;]"¹⁹ and that "customers would not reasonably expect that access to [customer information] would be limited within the company, but would expect that their proprietary information would not be disclosed to third parties without permission."²⁰ AT&T was successful in its arguments, as it should have been, because its arguments represented logic and reason and described generally adhered to AT&T practices.²¹

In addition to the AT&T case, the Commission has, on other occasions and in different contexts, found existing business relationships to be lacking in substantial privacy concerns.²²

¹⁸See In the Matter of Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Company, Memorandum Opinion and Order on Reconsideration, 104 FCC 2d. 739 (1986).

¹⁹Id. at 765 ¶ 49.

²⁰Id.

²¹See infra note 37.

²²See e.g., In the Matters of Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd. 1150, 1163 ¶ 98 (1988) (wherein the Commission stated that it anticipated that "most of the BOC network service customers . . . would not object to having their CPNI made available to the BOCs to increase the competitive offerings made to such customers."); In the Matter of the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, 7 FCC Rcd. 2736, 2738 ¶¶ 13-14 (1992) ("TCPA NPRM") ("If a party already has chosen to do business with a particular caller, a contact by that caller to offer additional products or services is not as intrusive as a
(continued...)

It is clear that it is the fact of the existing relationship that is important to consumers from a privacy perspective, regardless of how the relationship came into being. Thus, the fact that U S WEST may have a relationship with our customers that had its origination in the provision of some monopoly service, while relevant -- perhaps -- to a competitive inquiry, is basically irrelevant to an inquiry on potential customer anxiety over telephone company access and "privacy" concerns.²³

²²(...continued)
call from a business with whom the called party has no relationship. . . . The Commission tentatively concludes that the privacy rights the [Telephone Consumer protection Act ("TCPA")] intends to protect are not adversely affected where the called party has or had a voluntary business relationship with the caller."); In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd. 8752, 8770 ¶ 34 (1992) ("TCPA Report and Order") ("We conclude, based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship." (emphasis added)). While certain of the Commission's remarks appear to be restricted to the TCPA proceeding and its associated legislative history, other of its remarks appear to stem from common sense observations about the nature of the commercial relationships (see underlined material); In the Matter of Rules and Policies Regarding Calling Number Identification Service - Caller ID, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-281, rel. Mar. 29, 1994 ("Caller ID/ANI Order") at ¶ 58 ("conclud[ing] that an ANI services subscriber may use ANI to offer products or services to an established customer that are directly related to products or services previously provided by the ANI services subscriber to that customer."). While the "directly related" restriction does not necessarily appear required by customer privacy expectations, the relevancy of the existing business relationship in assessing consumer privacy expectations in the first instance is specifically acknowledged.

²³The fact that a business may have a "monopoly" with regard to certain products and/or services does not necessarily affect a customer's "privacy" expectation, at least to the extent that the information is not used beyond the confines of the monopoly and affiliated service providers. In almost all circumstances,
(continued...)

The above analysis is consistent with survey information about consumers and access to information about them. Historically, telephone companies have held an elevated position of trust with respect to accumulation of customer information²⁴ and use.²⁵ At U S WEST we still enjoy, we believe, this relationship of trust with our customers.²⁶ We see no need for external intervention in this relationship, from either regulatory or legislative entities.

²³(...continued)
whether discussing a monopoly or a competitive business, the rubber of privacy meets the road at third-party distribution and secondary use.

²⁴See Privacy in America, A National Survey of Public and Leadership Attitudes, Conducted for Sentry Insurance by Louis Harris and Associates, Inc., January 1979, Study No. 784226 at 49-51 ("Sentry Study") (only private doctors were considered more trustworthy than telephone companies).

²⁵See Highlights of The Road After 1984: Study of the Impact of Technology on Society, by Louis Harris and Associates, 1983, Part I: Information Abuse in the Computer Age, Information Abuse and the Growing Threat to Privacy, questions regarding Protection of Confidentiality by Various Institutions (the IRS and FBI were the only entities above phone companies); The Equifax Report on Consumers in the Information Age, a national opinion survey conducted for Equifax, Inc. ("Equifax") by Louis Harris and Associates and Westin, Alan F., Professor of Public Law and Government, Columbia University, 1990 ("1990 Equifax Report"), Chapter 2, at 19-21 (telephone companies were rated by 76 percent of respondents as protective and responsible with regard to consumer information, outranked by hospitals and the Census Bureau). Compare McManus Report at 12 ("Generally, RBOCs seem to be aware that they have a public trust stake in [transactional information about their customers].").

²⁶In our 1993 Focus Group, customers demonstrated a high level of trust and satisfaction with regard to U S WEST and our "privacy products" (basically our "listing" options). This level of trust/satisfaction drove customer expectations that we would act responsibly with regard to their privacy/confidentiality expectations.

B. Use of Customer Information by Affiliated Entities

The CPNI Public Notice indicates some concern over the "changing [telecommunications] environment" and suggests that "access to CPNI among affiliated companies may raise additional privacy concerns."²⁷ Despite repeated (but unsubstantiated) claims by privacy advocates and competitors that customers' privacy expectations are violated by the sharing of transactional information between and among affiliated companies, there are no facts to support such a position. There are facts, however, to support the contrary: that consumers find the practice of information sharing among affiliated companies acceptable. Those facts are discussed more fully below.

U S WEST, Inc., is comprised of a number of different companies, with various business interests, serving numerous markets both here and abroad. In addition to our telephone company, which provides both basic telephony and limited enhanced services to customers ranging from individual consumers and small businesses (who taken together compose a "mass market") to the largest of business and governmental users, we have companies providing cellular services, enhanced services, directory and list services. We are also partners in two relationships which have affiliations in the cable industry: Telewest International ("Telewest") is jointly owned by U S WEST and TeleCommunications, Inc. ("TCI"), operating in the United Kingdom, providing telephony and cable television services using common plant and equipment; and we are in a partnership with Time Warner

²⁷CPNI Public Notice at 3.

Entertainment to bring to fruition the full service network, beginning in Orlando, Florida.

Just as a customer's privacy expectation is not compromised by a "telephone company" selling the customer an enhanced service (such as VMS, video on demand, etc.), neither is it compromised by the company's use of that transactional business record information within a family of companies. As telephony and multimedia products/services converge, customers will be increasingly expecting that quality customer service will provide them with ranges of choice. What customers will not expect, from either a quality of service perspective or a privacy one, is that a company they called on Monday for phone service will know nothing about them when they call on Tuesday about video on demand, if the companies are considered the "same" (or similar)²⁸ in the eyes of the customer.²⁹

²⁸The "sameness" or similarly might have been created by affirmative company action, e.g., branding, or might be a feature observed through customer purchasing behavior, or might be the result of similarity in distribution channels. There are many ways in which the phenomenon of "similarity" might be caused. It is not the different ways that it is caused but the fact that it is caused that is important from a customer privacy perspective.

A customer might currently consider telephone service and cable service as being services in different markets, offered by unaffiliated entities. But that does not mean that is the only way in which they might view the services. Over time, as telephone companies and cable companies "partner" in their delivery of services, customers will come to view them differently than they do today. They will view them either as part of the same market or as part of a joint delivery channel.

²⁹Certainly, for the customers of Telewest in the United Kingdom, the fact that information of Telewest is used in the provision of both telephony and cable service (regardless of which "service" first captured the customers' attention) does not compromise those customers' "privacy" expectations.

Thus, the question of whether CPNI should be able to be shared between and among affiliated enterprises is generally "yes." Customer transactional information is currently generally shared by businesses of all kinds with their affiliated companies, including most telecommunications businesses. And, while consumers may have evidenced increasing generalized concerns over privacy in the last decade, recent evidence demonstrates that those concerns do not include information sharing between and among affiliated companies.

Earlier this year, a survey commissioned by certain credit grantors³⁰ was concluded which confirmed that information sharing between corporate affiliates is an acceptable practice and does not compromise consumer expectations. A question was asked in that survey about the sharing of information among subsidiaries of the same company, for the purpose of offering the consumer products or services from various subsidiaries.³¹ Sixty-three percent of the public felt that such sharing was

³⁰Consumers, Credit Reporting, and Fair Credit Reporting Act Issues, 1994, A National Opinion Survey conducted by Louis Harris & Associates and Dr. Alan F. Westin for MasterCard International, Inc., and VISA, U.S.A., Inc. ("1994 Harris Survey").

³¹The exact question was: "Now, I'd like to ask you some questions about offers corporations often make to consumers. For example, one subsidiary or company within a corporate family may want to mail an offer of products or services to customers of another subsidiary or company within the same corporate family, because they believe the customer would be interested in those products or services. Before extending the offer, information about the customer is shared with the subsidiary making the new offer. How acceptable is this use of customer information among subsidiaries of the same corporate family to make offers of services or products?"

acceptable.³² Strong majorities of all demographic groups supported such information sharing and higher-income groups supported the sharing at higher levels than the general public.³³

From the above, it is obvious that affiliated companies need not generally adopt a policy of "non-sharing" of information in order to accommodate customer privacy expectations. On the contrary, it would seem that only when intra-corporate sharing would violate customers' expectations about appropriate information use practices, perhaps because the relationship between or among the companies was not well known or understood (such as a telecommunications company also being in the retail car businesses),³⁴ should a company be reluctant to make use of the transactional information at its disposal.

³²As the "sharing" question became more specific, identifying the kind of information that might be shared (thus suggesting the subsidiaries that might be doing the sharing) the acceptability figures increased (e.g., 71 percent responded that it was acceptable to offer a credit card to customers who have a mortgage with a subsidiary; 77 percent to offer a credit card to those with a checking account with a subsidiary; 70 percent to offer insurance to customers having a loan with a subsidiary; 71 percent to offer mutual funds to customers with a checking account or loan with a subsidiary).

³³An interpretive essay of the Harris survey and its various findings, authored by Dr. Alan Westin, will be forthcoming in Privacy & American Business.

³⁴This might not even compromise a customer's expectation if the relationship was known and understood by the customer, either as a matter of general knowledge or due to aggressive disclosure by the company. For example, Sears, while generally a retail outlet of consumer goods, also engages in car rentals and banking operations. A Sears customer may not feel violated by a sharing of the retail information with the other affiliated enterprises, especially if what was occurring was that the customer was being afforded a "benefit" as a result of the information sharing.

This reluctance should be based on respect for customer expectations and market differentiation phenomena, both of which can and might change over time. But, this kind of market appreciation will generally not be lost on businesses. It is highly unlikely that either regulatory or legislative initiatives are required to bring home the patent legitimacy of these propositions.

C. Third-Party Uses

Despite the lack of legislative prohibitions, telephone companies traditionally have not released customer information (beyond name and address information) to third parties without the consent of the customer. In addition to the established practice itself, this practice has sometimes been affirmatively communicated to customers.

U S WEST does not provide customer transactional detail to third parties barring customer consent or legal process.³⁵ Indeed, to protect the privacy of customers calling in to request transactional detail (usually in the form of a duplicate bill), U S WEST sends the records to the billing address, not to some other address.³⁶ Not only is this a long-standing practice, but

³⁵U S WEST does provide certain customer name and address list services out of both our telephone company and our directory company. Certain lists are provided to directory publishers and other interested parties and contain only listed name and address information (*i.e.*, those customers affirmatively asking to be listed in our telephone directory). Other lists are provided to telecommunications providers and are comprised of Billing Name and Address ("BNA") information.

³⁶In this way, the information should reach the "proper" party, or if it reaches the billing addressee and that party did not request the information, a red flag is raised.

we have advised our customers that their "Privacy is Important" and that our "[c]ustomer service records, credit information and related confidential personal account information are fully protected."³⁷

Furthermore, as a part of our internal employee expectations, we advise that "[C]ustomers must be able to use the network secure that their usage and their communications will be kept confidential. . . . [Employees] must keep confidential what [they] hear and see when handling or observing calls, records of calls, data transmission, voice mail or and other messages. Also, we must make sure that unauthorized persons do not listen to telephone communications that we handle."³⁸

In both U S WEST's 1989 and 1993 Focus Groups, customers were firm in their expectation that information about them not be given to third parties unless the circumstances of such disclosure were made known to them and they concurred in the release. In the 1993 Focus Group (i.e., the residential nonpublished/nonlisted customers), the inquiry was more refined. The respondents generally indicated that, while internal company

³⁷This message is conveyed in the Call Guide Section of the White Pages of our telephone books. Compare comments of Judge Wilkey for the majority in Reporters Com. v. American Telephone & Telegraph, 593 F.2d 1030, 1082 n.12 (D.C. Cir. 1978) ("AT&T's disclosure of toll billing records without notice calls into question the company's privacy obligations to its customers. . . . AT&T's own pronouncements and publicly stated policy of respecting subscriber privacy, . . . suggest that one of the essential elements in the contractual relationship between the appellants and AT&T is the appellants' expectation of privacy, not only with respect to the content of communications over AT&T lines, but also with respect to the identities of the participants in those communications.").

³⁸See Annual Coverages, U S WEST Code of Business Ethics and Conduct, Study Guide, Text Version, Module 1 (Jan. 1, 1992).

use of the information (even for marketing) was permissible, external use should be restricted. Nonlisted customers were generally agreeable that a phone company could release information to their own interexchange provider ("IXC"), but questioned the need for doing so (as the information could be obtained by the IXC directly from the customer); whereas nonpublished customers expressed an interest in not having such information released. Both categories of customers believed that information should not be transferred by the phone company to other IXCs or telecommunications companies or to other companies in general, without their understanding or approval.

Again, while the above represents a modicum of "proof" to what appears to be a fairly self-evident proposition, it is supported by other sources, as well. These findings are consistent with other studies: American Express Opinion Survey, @ 1987-88 (80 percent of respondents -- representing both members and non-members -- did not think companies should give out personal information to other companies);³⁹ and Opinion Trend, by Bell Communications Research ("Bellcore") (94 percent of respondents believed that telephone companies should be required to ask permission before providing customer names and addresses to another organization).⁴⁰ They are also consistent with

³⁹As reported in the "Remarks of Jonathan S. Linen", President, Direct Marketing Group, American Express Travel Related Services Company, Inc., at the Direct Marketing Association's 71st Annual Conference and Exhibition, Oct. 17, 1988. See also McManus Report at 53.

⁴⁰Opinion Trend, Cambridge Reports: First Quarter 1988 Survey, commissioned by Bellcore, dated Mar. 30, 1988, at 2.

educated observations by those who have studied the matter with some reflection.⁴¹

III. EXISTING FEDERAL MODELS REGARDING CONSUMER PRIVACY EXPECTATIONS

A. The Commission's CPNI Rules

As stated above,⁴² the Commission's currently-crafted CPNI Rules, while overly cautious with regard to use of customer information, are generally in accord with consumer privacy expectations and the prior records that the Commission has amassed with respect to CPNI access, use and distribution. The Commission is correct that a "prior authorization rule would as a practical matter deny to all but the largest business customers the one-stop-shopping benefits of integrated marketing of basic and enhanced services by BOCs."⁴³

The Commission was also correct with regard to its resolution of the matter of a customer notification requirement with respect to small businesses and consumers -- one is not necessary. It is generally not necessary for a business to

⁴¹See McManus Report at 63 ("customers clearly have a legitimate privacy stake in somehow restricting the access of others to their records." (emphasis added)).

⁴²See Section I pages 1-3.

⁴³CPNI Public Notice at 2. And see U S WEST Computer III Remand Comments, Appendix A at 85-88, wherein U S WEST describes its one experiment with securing affirmative customer consents. While that experiment demonstrates that it can be done, it was not done within the context of an "idea" or a "state of being" but with regard to an existing product, currently received, that was going to be taken away if no affirmation was made (thus, providing -- at least theoretically -- a higher level of motivation regarding a response) and it was not done without a price.

advise consumers of matters they already know.⁴⁴ And, certainly, customers of a business already know that the business has transactional records about the relationship.⁴⁵ No purpose is really served by notifying customers of this obvious fact.

Not only is a customer notification of internal company use of information not necessary, but providing such notification often produces confusion and responses not directed to the substance of the notification itself.⁴⁶

⁴⁴See In the Matter of Policies and Rules Concerning Toll Fraud, CC Docket No. 93-292, Reply of Southwestern Bell Corporation, filed Feb. 10, 1994, at 3-4: "The notion that life's travail can be exorcised by the giving of notice is firmly rooted in late twentieth century American thought and approaches belief in the efficacy of incantations. Thus, all available square inch of the housings of new lawnmowers are now covered with labels such as **DANGER!**, **WARNING!**, **HAZARD!**, and the like. And the finer print warns prospective users that placing one's limbs in the path of the whirring blade may cause injury or death.

The implicit assumption behind notice requirement is that people are not smart enough to take care of themselves and are therefore in need of guidance. What the notice proponents fail to comprehend is that people, by and large, are very self-interested and will not change their behavior unless something gives them the incentive (monetary or otherwise) to do so." And see infra note 81.

⁴⁵See supra note 12.

⁴⁶Two examples will demonstrate this. U S WEST has always provided CPNI notifications to all our business customers -- not just "large" businesses or those with a certain number of lines. It was simply too costly to separate out these customers for purposes of targeted "notifications." We have, on occasion and often as a result of the notification itself, received requests from small business customers to "restrict their CPNI." But when we discussed this matter with them, we determined that what they were really asking was to be taken off marketing lists. This "problem" was so severe that in our last iteration of our CPNI notification, we added a specific statement that restricting/not restricting CPNI had nothing to do with marketing lists and non-disclosure with regard to marketing lists, directing those interested in resolving a marketing list issue to other resources. As a consequence, U S WEST received much fewer calls
(continued...)